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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

Nos. 73-437, 73-457, 73-464

MOBIL OIL CORPORATION,
PUBLIC SERVICE COMMISSION OF NEW YORK,
MUNICIPAL DISTRIBUTORS GROUP,
Petitioners

v.

FEDERAL POWER COMMISSION,
Respondent

On Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF INTERVENOR-RESPONDENT ASSOCIATED GAS DISTRIBUTORS

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ASSOCIATED GAS DISTRIBUTORS

Alabama Gas Corporation

Atlanta Gas Light Company

The Berkshire Gas Company; Boston Gas Company; Bristol and Warren Gas Company; Brockton Taunton Gas Company; Bunards Bay Gas Company; Commonwealth Gas Company; City of Holyoke, Massachusetts Gas and Electric Department; City of Westfield Gas and Electric Light Department; Concord Natural Gas Corporation; The Connecticut Gas Company; Connecticut Natural Gas Corporation; Fall River Gas Company; Fitchburg Gas and Electric Light Company; Gas Service, Inc.; The Greenwich Gas Company; The Hartford Electric Light Company; Haverhill Gas Company; Lawrence Gas Company; Lowell Gas Company; Lynn Gas Company; Manchester Gas Company; Mystic Valley Gas Company; New Bedford Gas and Edison Light Company; The Newport Gas Light Company; Northhampton Gas Light Company; North Attleboro Gas Company; Northern Utilities, Inc.; North Shore Gas Company; The Pequot Gas Company; South County Gas Company; Southern Connecticut Gas Company; Springfield Gas Light Company; and Tiverton Gas Company (jointly)

The Brooklyn Union Gas Company

Central Hudson Gas and Electric Corporation

Consolidated Edison Company of New York, Inc.

Delmarva Power & Light Company

Elizabethtown Gas Company

Long Island Lighting Company

New Jersey Natural Gas Company

New York State Electric & Gas Corporation

Philadelphia Electric Company

Philadelphia Gas Works, Division of UGI Corporation

Piedmont Natural Gas Company, Inc.

Public Service Company of North Carolina

Public Service Electric and Gas Company

Rochester Gas and Electric Corporation

UGI Corporation

Washington Gas Light Company

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OPINIONS BELOW

The opinion of the U.S. Court of Appeals of the Fifth Circuit and its opinion denying rehearing are reported at 483 F.2d 880. The opinions and orders of

the Federal Power Commission are reported at 46 FPC 86 and 46 FPC 633 and appear in the Joint Appendix at II A. 559-668 and II A. 865-885.

JURISDICTION

The judgment of the Court of Appeals was entered on April 16, 1973. Timely petition for rehearing was denied on June 11, 1973. The petition for writ of certiorari in No. 73-437 was filed on September 6, 1973. The petition in No. 73-457 was filed on September 10, 1973 and the petition in No. 73-464 was filed on September 10, 1973. These petitions were granted on January 14, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

STATUTES INVOLVED

Sections 4, 5 and 19(b) of the Natural Gas Act, 52 Stat. 821, 822, 831, as amended, 15 U.S.C. §§ 717c, 717d, 717r, are involved and are reproduced in the Appendices to the Petition for writ of certiorari filed by Mobil Oil Corporation in No. 73-457 (App. D to Pet., pp. 65-69).

QUESTIONS PRESENTED

1. Whether the FPC's area rate orders reflect *undue* discrimination where the differences in their impact on various producers are rationally related to the goal of eliciting an increased supply of natural gas for the interstate market?

2. Whether the FPC's findings as to the appropriate new gas rate levels should be appraised on the instant record or on events occurring after the issuance of the order?

STATEMENT OF THE CASE

Associated Gas Distributors (AGD) is an unincorporated group of gas distribution companies which provide utility service to gas consumers in Alabama and along the eastern seaboard from Georgia through New England. Its membership (listed on the inside front cover) includes companies which sell about 25 percent of the nation's annual natural gas consumption. A major portion of the gas sold by these companies is produced in Southern Louisiana. The AGD companies have actively participated on a joint basis in the Southern Louisiana Area Rate Proceeding since the F.P.C. first commenced formal hearing in this matter in 1963. AGD has presented a comprehensive evidentiary case in both the first and second "rounds" of this case as well as in other area rate hearings before the Commission. Likewise, AGD took an active part in the negotiations which led to the settlement proposal adopted in the order here on review.

To avoid unnecessary extension of this brief, AGD adopts the Statement of the Case contained in the Brief of the Petitioner Municipal Distributors Group, with the following supplementary statement.

1. The Contingent Escalation and Refund Credit Provisions

From the crucial standpoint of improved gas supply, the key features of the order on review are the so-called contingent escalation and refund credit provisions. These two provisions, worked out in the course of settlement negotiations involving *all* parties (including Petitioners here), are also the most controversial components of the order. The contingent escalation provision (R. 13681), in brief, is a ceiling rate esca-

lator applicable to *flowing* gas contracts (those dated prior to October 1, 1968) which is triggered in three half-cent steps by the industry's aggregate commitment of specified volumes of new Southern Louisiana gas reserves to the interstate market. The maximum contingent escalation of 1.5 cents per Mcf is achieved by a total area dedication of 15 trillion cubic feet in new gas reserves within the six year period ending October 1977. The refund credit provision also embodies the new gas supply-contingency concept. Specifically, this provision (R. 13690) allows those producers owing refunds on past sales to discharge these obligations within five years upon the commitment of new gas reserves; a refund "credit" of one cent per Mcf of gas reserves dedicated is permitted in lieu of cash refunds, at the producer's option. Each of these provisions is discussed in the arguments below.

2. Applicable Principles of Judicial Review

It is axiomatic that the order here is entitled to a "presumption of validity" and may not be upset absent a convincing showing that its consequences are unjust and unreasonable.[1] This proposition is particularly relevant in the context of the current national energy crisis which includes an acute natural gas shortage. Thus it is arguable that the instant order has *not* cured the gas shortage in the consuming areas dependent on Southern Louisiana reserves and that the order is ipso facto invalid. Such an approach to this case would be both overly simplistic and ill-suited to the role of judicial review. We say overly simplistic because the current gas shortage, like the general energy shortage, is the result of a host of economic, political, environ-

[1] The *Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968).

mental and other factors—many of which are beyond either government or F.P.C. control. Moreover, it is impossible at this point to say with certainty what volume of new gas reserves has been found in the Southern Louisiana area after the date of this order.[2]

ARGUMENT

I. FPC RULINGS ON REFUNDS AND CONTINGENT ESCALATIONS ARE REASONABLY RELATED TO THE GOAL OF IMPROVED GAS SUPPLY IN THE SOUTHERN LOUISIANA AREA.

Section I of the Mobil brief concentrates on the disparate impact of the instant order on the various producer companies. Mobil argues that the given differences in economic impact among various classes of producers (e.g., between producers *with* refund obligations and those without) constitute undue discrimination and are therefore unlawful under Sections 4 and 5 of the Natural Gas Act. The specific provisions of the order attacked by Mobil are those relating to contingent escalations and refund credits. As pointed out in the succeeding discussion, these arguments overlook the basic thrust of the provisions in question: the need to establish a rate structure wherein a meaningful link is forged between price and supply. An understanding of this attribute of the rate order under review is essential to any evaluation of its validity. It is the fundamental feature of the order which overrides Mobil's arguments.

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[2] See Notice of Issuance of Revised Staff Nationwide Cost Study and Staff Study of American Gas Association Reserve Additions, issued March 21, 1974 at F.P.C. Docket No. R-389-B. This Notice calls attention to a significant disparity in 1971 and 1972 Southern Louisiana gas reserve additions as reported by the American Gas Association (the source generally relied upon by the F.P.C.) and a study of new gas reserves prepared by the F.P.C. staff.

A. The General Inability to Measure the Responsiveness of Gas Supply to Price Justifies the Commission's Use of Contingent Escalation and Refund Credit Provisions

This case vividly illustrates the ratemaking policy dilemma which is inherent in the application of the Natural Gas Act to the rates for gas sales by producing companies. Under its statutory mandate, the FPC is charged with the overall responsibility to maintain an adequate gas supply for the consumers served through the interstate supply system. The regulatory tool for implementing this responsibility is ratemaking power embodied in Sections 4 and 5 of the Natural Gas Act. *In theory,* the Commission can adjust the rate ceilings for producer sales according to the need for greater or lesser new gas supplies at any given time.[3]

In reality, however, the situation is far more complex. In the order here under review the Commission repeated a fundamental finding made in earlier producer area rate orders: There is no reliable method of measuring the price elasticity of gas supply (46 FPC at 121; see *Placid Oil Co.* v. *F.P.C.,* 483 F.2d 880, 901 (1973)). Stated otherwise, the Commission here concluded that it could not determine what amount of additional gas supply would be found and/or sold as the result of any particular change in gas price. It follows that the Commission cannot hope to carry out its gas supply obligation merely by adjusting the rate ceiling for gas producers.

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[3] The latitude given the Commission in prescribing increases in rates to attract increased gas supply is limited by the Section 5 admonition against any rates which "are not the lowest reasonable rate." See *City of Detroit* v. *F.P.C.,* 230 F.2d 810, 815 (D.C. Cir. 1955) *cert. denied,* 352 U.S. 829 (1956).

Given this economic context, the contingent escalation and refund credit provisions give the Commission a regulatory tool which it does not otherwise possess. Under the contingent escalation provision here, the rate ceiling for flowing gas sales is raised in half-cent increments after specific, targeted volumes of new gas have been committed to the interstate market. This feature of the instant rate structure thus imparts or establishes a measurable and direct relationship between gas prices and gas supply. The refund credit provisions perform a similar function: the producers are able to discharge refund obligations *by committing specified volumes of new gas to the interstate market.*

The relevance of the supply-eliciting function of these provisions is obvious. Whatever dispute may exist as to its degree, all parties acknowledge the existence of a serious and growing domestic gas shortage. Given its responsibility to maintain adequate supplies at the lowest reasonable rate, the Commission reasonably regarded these provisions as an appropriate mechanism for protecting the public interest.

Mobil's allegations of undue discrimination, therefore, are but the starting point for a judicial appraisal of the contingent escalation and refund credit provisions of the instant order. The fact is these provisions create a crucial link between the supply and price of natural gas; without these or other comparable provisions, there is no assurance that the consumer will receive any *quid pro quo* in the form of needed gas supply—in return for higher gas prices. Any discrimination claims regarding these provisions must therefore be weighed against the positive gas supply

benefits at which these provisions are aimed.[4] Obviously, the Commission's obligation to protect the consumer's interest in improved gas supply is a more weighty value than that of avoiding discrimination as between regulated producers. Accordingly, the Commission's approval of contingent escalation and refund credit provisions should not be disturbed on grounds of undue discrimination.

B. A Uniform Area Rate Structure Need Not Guarantee Uniform Treatment of Each Producer

By reference to selected episodes in the overall course of producer gas rate regulation, Mobil points out that the refund provisions of the order here allow certain producers to retain revenues collected at rates above those which Mobil had collected on its sales during the same time period (pp. 39-44, Mobil brief). Reduced to essentials, Mobil's point is that certain producers fared better than Mobil under the order here.

Conceding arguendo, the factual predicate of the contention, this argument has no weight. First, much of Mobil's complaint runs to extraneous past events, voluntary actions on its part and Commission rulings not before the Court in this case. The effect of these earlier, extra-record events is irrelevant in appraising the validity of the instant order. More important, Mobil's argument assumes without precedent or support, that an order which knowingly causes uneven economic impact on different producers is *unduly* dis-

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[4] "The added incentive of a contingent escalation on flowing gas rates could reasonably be thought to encourage the commitment of 15 Tcf within the 5 year period. Likewise, the refund credit structure would stimulate another 15 Tcf of new reserves." *Placid Oil Co.* v. *F.P.C., supra,* at 902.

criminatory. Nothing in the Natural Gas Act entitles Mobil to a rate structure which guarantees equality of economic impact between it and other producers. Indeed, the very concept of *uniform* area rate regulation, upheld in the *Permian Basin* case,[5] implies that the economic consequences *will* vary from producer to producer, depending on each company's circumstances. Moreover, there is no basis on this record to conclude that the instant order has deprived Mobil of adequate rates or that its overall revenues are any less adequate than another producer's (Mobil brief, p. 45). A determination of "adequate revenues" to any given producer involves, at the very least, some analysis of its individual company costs vs. its revenues over a given period of time. Likewise, a producer's revenues are related primarily to its *contract pricing provisions,* and only secondarily to the regulated rate ceilings adopted by the F.P.C.

Nor is there any basis for the allegation that the instant order compels Mobil to compete unequally with other producers for working capital and lease acquisitions. Mobil's competitive posture in relation to other producers results from a broad range of factors relating to its entire scope of operations. To support the claim that Mobil is unable to compete equally with other producers in any market area would require an economic analysis far beyond the scope of any evidence in this proceeding.

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[5] *Permian Basin Area Rate Cases,* 390 U.S. 747, *supra.*

II. SUBSEQUENT FPC RATE ORDERS AND FINDINGS DO NOT INVALIDATE THE ORDERS HERE.

Mobil argues that the new gas rate ceiling is too low as shown by the Commission's subsequent rulings regarding "optional" pricing and other rulemaking orders (Brief, p. 62, 68-71). The complete answer to this attack is that it is based on 20-20 hindsight. The order here, as any other, should be evaluated on the basis of the record compiled in *this case,* not on the basis of subsequent events. To hold otherwise would be to require clairvoyance on the part of the Commission.

There is no basis for concluding that the gas supply picture would be improved by a Court reversal of this order. A fundamental truism here is that *rate stability and certainty* are essential ingredients of a favorable gas supply climate. If the instant order is upset, chaos and economic uncertainty would prevail in the nation's most important gas supply area. This condition would prevail for at least another three years as the Commission and the courts reconsidered the issues presented here. On the other hand, an affirmance of this order would add a measure of rate certainty which has never before existed in this area. To discard this opportunity for firm, just and reasonable rates in this vital area after 14 years of litigation would be a major blow to the interest of the nation's gas consumers.

Finally, it is important to recognize that this order does not purport to be the ultimate answer to the gas shortage. Under its statutory mandate, the Commission is obliged to maintain surveillance of gas supply circumstances and to respond accordingly. The fact that circumstances have continued to change and that

the Commission has undertaken new responses does not ipso facto prove the invalidity of the order at bar. Rather, it shows that the instant order is but one chapter in a story which continues to unfold.

CONCLUSION

For the foregoing reasons, AGD respectfully requests that the Commission order be affirmed.

Respectfully submitted,

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